

national bank power and therefore was preempted by operation of the Supremacy Clause.

For example, ordinances passed by four municipalities in California and New Jersey specifically to prohibit ATM access fees were enjoined by district court order on grounds that included National Bank Act preemption. In California, the district court entered a preliminary injunction against the fee prohibition ordinances adopted by San Francisco and Santa Monica, and the Ninth Circuit affirmed. On remand, the district court entered a permanent injunction against the ordinances, and the Ninth Circuit once again affirmed.²⁴ Similarly, a Federal district court in New Jersey entered temporary restraining orders preventing fee prohibition ordinances adopted by Newark and Woodbridge from becoming effective. The combined case was ultimately settled by each city's consent to a permanent injunction against its ordinance.²⁵ A Federal district court in Des Moines declared a longstanding Iowa prohibition on ATM access fees to be in conflict with the national bank power to charge fees and therefore preempted.²⁶ For similar reasons, the Fifth Circuit upheld a Federal district court ruling that Federal law displaced a Texas statute that prohibited the charging of fees for cashing checks drawn upon accounts at the payor bank.²⁷ A Federal district court in Georgia reached the same conclusion with respect to a Georgia law that similarly attempted to restrict the authority of national banks under Federal law to charge such fees.²⁸

Restrictions on national bank activities other than the charging of fees have also been held preempted. Deferring to the OCC's interpretations of the National Bank Act, the Eighth Circuit held that Federal law preempted Iowa restrictions on ATM location, operation, and advertising as applied to national banks.²⁹ More recently, a Federal district court in California permanently enjoined the California Attorney General and Director of the Department of Consumer Affairs from enforcing a California statute requiring that certain language and information be placed on the billing statements credit

card issuers provide their cardholders.³⁰ In so doing, the Court held that there is "no indication in the NBA that Congress intended to subject that power [to loan money on personal security] to local restriction." Thus, the court applied "the ordinary rule * * * of preemption of contrary state law."³¹ Contrary state law also may be preempted by Federal regulation. "Federal regulations have no less pre-emptive effect than federal statutes."³²

5. Limited Circumstances Under Which State Laws Apply to National Banks

Federal courts apply no general presumption that state laws are applicable to national banks. As explained recently by the Supreme Court, a presumption against preemption is "not triggered when the States regulate in an area where there has been a history of significant federal presence."³³ As further explained by the Ninth Circuit in *Bank of America*, "because there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable."³⁴

Moreover, no Federal statute endorses the presumptive application of state laws to national banks. Although the national bank branching statute makes applicable the laws of the host state regarding community reinvestment, consumer protection, and fair lending to branches of an out-of-state national bank located in the host state to the same extent as those laws apply to a bank chartered by that state, the statute expressly excepts any case where Federal law preempts the application of state law to national banks.³⁵

In a few situations, Federal law has incorporated provisions of state law for specific purposes,³⁶ and Congress may more generally establish standards that govern when state law will apply to

national banks' activities.³⁷ In such cases, the OCC applies the law or the standards that Congress has required or established.

State laws also may apply to national banks' activities under circumstances that have been described variously by the courts as not altering or conditioning a national bank's ability to exercise a power that Federal law grants to it.³⁸ "Thus, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."³⁹ Notably, these types of laws typically do not regulate the manner or content of the business of banking authorized for national banks under Federal law, but rather establish the legal infrastructure that surrounds and supports the conduct of that business. In other words, they promote a national bank's ability to conduct business; they do not obstruct a national bank's exercise of powers granted under Federal law.⁴⁰

6. Examples of Types of State Laws Found to be Preempted

The OCC and Federal courts have thus far concluded that a wide variety of state laws are preempted, either because the state laws fit within the express preemption provisions of an OCC regulation or because the laws

³⁷ See, e.g., 15 U.S.C. 6701 (codification of section 104 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338, 1352 (1999), which establishes standards for determining the applicability of state law to different types of activities conducted by national banks, other insured depository institutions, and their affiliates).

³⁸ See *Barnett*, 517 U.S. at 33.

³⁹ *Bank of America*, 309 F.3d at 559. As stated in 12 U.S.C. 548, for the purposes of state tax laws, "a national bank shall be treated as a bank organized and existing under the laws of the State * * * within which its principal office is located." With regard to state criminal laws, it is important to recognize the distinction drawn by the Supreme Court in *Easton* between "crimes defined and punishable at common law or by the general statutes of a State" and "crimes and offenses cognizable under the authority of the United States." 188 U.S. at 238. The Court stated that "[u]ndoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. * * * But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits). Further, as we note *infra* in footnote 86, we will look to the substance and effect of a state law in determining whether a particular state law falls into a category of state laws that are not preempted; a state may not immunize a law from preemption simply by applying a criminal penalty to it. Also, notably, "[c]onsumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks." *Lockyer*, 239 F. Supp. 2d at 1016.

⁴⁰ See *Barnett*, 517 U.S. at 33-34.

²⁴ See *Bank of America, N.A. v. City & County of San Francisco*, 2000 WL 33376673 (N.D. Cal. June 30, 2000), *aff'd*, *Bank of America*, 309 F.3d 551.

²⁵ See *New Jersey Bankers Ass'n v. Township of Woodbridge*, No. CV-00-702 (JAG) (D.N.J. Nov. 8, 2000).

²⁶ See *Metrobank*, 193 F. Supp. 2d 1156.

²⁷ See *Wells Fargo Bank Texas*, 321 F.3d 488.

²⁸ See *Bank of America, N.A. v. Sorrell*, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).

²⁹ See *Bank One, Utah*, 190 F.3d 844.

³⁰ See *American Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000 (E.D. Cal. 2002).

³¹ *Id.* at 1016; see also *Wells Fargo Bank, N.A. v. Boutris*, 2003 WL 21277203 at *3 (E.D. Cal. May 9, 2003) (*Wells Fargo Bank II*) (The National Bank Act "was enacted to 'facilitate * * * a national banking system,' and 'to protect national banks against intrusive regulation by the States.'") (citations omitted).

³² *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

³³ *United States v. Locke*, 529 U.S. 89, 108 (2000).

³⁴ 309 F.3d at 559.

³⁵ See 12 U.S.C. 36(f)(1)(A). This provision was added to the branching statute by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. 103-328, 108 Stat. 2338, 2350 (1994).

³⁶ See, e.g., 12 U.S.C. 92(a) (the extent of a national bank's fiduciary powers is determined by reference to the law of the state where the national bank is located).